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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAMION JOHNSON, Defendant and Appellant.	D046758 (Super. Ct. Nos. SCS189831, SCD188782)

APPEAL from judgments of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

This is a consolidated appeal arising from superior court case Nos. SCS189831 and SCD188782. In case No. SCS189831 a jury convicted Damion Johnson of robbery and resisting arrest. (Pen. Code,[1] §§ 211, 148, subd. (a)(1).) In case No. SCD188782 Johnson pled guilty to robbery and using a pellet gun in the commission of that offense. (§§ 211, 12022, subd. (b)(1).) Johnson was sentenced to seven years in prison and

appeals in each of his cases. In case No. SCS189831 he argues the trial court committed prejudicial error by instructing the jury pursuant to CALJIC No. 2.92 on eyewitness testimony. In case No. SCD188782 appellant contends he had a federal constitutional right to a jury trial and proof beyond a reasonable doubt with respect to facts used to justify the upper-term sentence he was given. For clarity, we will address each case separately. We affirm both judgments.

I. *Case No. SCS189831*

A. *Prosecution Evidence*

On December 6, 2004, Martha Gamboa was working at National City Middle School. She left work around 12:00 p.m. to go to lunch. Gamboa testified that as she was departing the school, a man she would later identify as appellant walked by and said: "Good morning ma'am." She replied: "Hi, good morning." After their face-to-face encounter, Gamboa continued walking toward her car in the nearby parking lot. As she was about to open the car door, appellant stepped in front of her, punched her in the ear with a closed fist, pointed a black gun in her face and attempted to pull her purse from her shoulder. Gamboa resisted, but eventually the strap broke and appellant ran away with her purse. At the time of the robbery, Gamboa's purse contained approximately $200, including a $100 bill.

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1 All further statutory references are to the Penal Code unless otherwise specified.

Gamboa yelled for help. Mark Liberto was in a parking lot near the middle school when he heard a woman scream. He then saw a black male jogging down the street. The man was wearing a dark ski cap and carrying something in his hands.

A short time later, Assistant Principal Victor Tapia received a radio call that Gamboa had been robbed on school property. He immediately went to speak to Gamboa, who was shaking and in tears. Gamboa testified she saw appellant run north on D Street. She described her assailant as a black male wearing a beanie, black pants and a black "puffy" jacket. Tapia told his staff to call the police and went out looking for the robber.

As Tapia drove through an alley, about a block and a half from the middle school, he saw a man who fit the robber's description. At trial, Tapia identified the man as appellant. Tapia stated appellant was pacing back and forth and going through what looked like a booklet or checkbook. Tapia followed him until he encountered the police, including Officer Gregory Dumas. Tapia pointed to appellant and informed Dumas he was the man they were looking for.

Dumas saw appellant walk around a corner carrying something under his arm. Dumas followed on foot with his weapon drawn and found appellant squatting on the ground tucking a jacket inside out. Dumas repeatedly shouted the order for appellant to "Get down on the ground." Instead of obeying the officer's instructions, appellant abandoned the jacket and ran away. Dumas lost sight of appellant but radioed a description of him to other officers.

Alejandro Corona testified he saw a black male carrying a sweatshirt near the yard of his house on F Avenue around the time of the robbery. Corona heard police sirens and saw the man running away and trying to hide, but when police arrived the man was gone.

Around the same time, Raul Garcia was taking a shower at his home on E Avenue. Garcia testified he heard a loud noise coming from his backyard and saw appellant jump over the fence and try to hide under his deck. He went to his front yard and informed a passing police officer. Garcia then heard yelling and saw police officers arresting appellant in his driveway.

In a search of the area, officers found a black beanie on the ground in the alley between E and F streets. An officer also found two pellet guns on the opposite side of the fence where appellant left the jacket during his encounter with Dumas. At the time of his arrest, appellant was carrying $128 in cash, including a $100 bill.

Paramedics took Gamboa to the hospital due to elevated blood pressure. As Gamboa was leaving in the ambulance, a police officer asked her to look at appellant to potentially identify her assailant. She stated she was not "100 percent" sure if appellant was the robber because he was not wearing a beanie or a jacket and his pants were dirtier than those worn by the robber. During her trial testimony, Gamboa was 100 percent sure appellant was the robber based on his eyes. Gamboa also identified a black pellet gun as the gun appellant pointed at her. She also identified a black jacket, a pair of black pants and a black beanie as the clothes worn by appellant during the robbery.

B. *Defense Evidence*

Appellant's defense was misidentification. Appellant's sole witness was Dr. Thomas Mac Speiden, a clinical psychologist and expert witness on eyewitness identification. Mac Speiden testified about psychological studies concerning the ability of individuals to recall events, the effects of stress on a crime victim's ability to acquire information and recall it at a later time and the unreliability of curbside lineups as a means for crime victims to correctly identify the perpetrator of a crime. Mac Speiden testified that studies have shown no correlation between a witness's certainty as to the identification of the culprit of a crime and the accuracy of that identification.

C. *Discussion*

Appellant argues the trial court prejudicially erred by instructing the jury pursuant to CALJIC No. 2.92 that it should consider an eyewitness's level of certainty as one of the factors in an identification. He urges the instruction unfairly favored the prosecution by inviting the jury to disregard Dr. Mac Speiden's expert testimony that certainty was not relevant. We disagree.

At the conclusion of trial, the judge gave the jury the standard instruction regarding eyewitness testimony in accordance with CALJIC No. 2.92 that said: "Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crimes charged. In determining the weight to be given eyewitness identification testimony, you *should* consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness's identification of the defendant, including, but not limited to, any of the following: . . . ." (Italics added.)

The instruction then lists 11 other factors for the jurors' consideration, including "[t]he extent to which the witness is either certain or uncertain of the identification." Appellant focuses upon use of the word "should" and the concept of certainty. He insists the instruction essentially told the jurors to reject Dr. Mac Speiden's testimony. Appellant is mistaken.

In fact, the trial court instructed the jurors they should not accept eyewitness testimony as certain. Instead, they *should* consider the believability of each witness, which would include what they heard from Dr. Mac Speiden about eyewitness accuracy and reliability and the fact that a witness's level of confidence, high or low, is a proper factor to consider in judging the identification. The jury, as the trier of fact, listened to each witness presented by the prosecution and defense. It was the jury's responsibility to credit each opinion or reject it. (*People v. Harris* (2000) 83 Cal.App.4th 371, 375.)

Appellant essentially argues expert testimony must be accepted. This is not the case. The trial court instructed on expert testimony, stating jurors should "consider the qualifications and believability" of an expert and reminded them they are not "bound by an opinion." (CALJIC No. 2.80.)

In any event, the instruction has been approved as sufficient guidance on the factors affecting eyewitness identification. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1231.)

There was no error in instructing the jury.

II. *Case No. SCD188782*

A. *Facts and Procedural History*

On the afternoon of December 4, 2004, Phuong Ta and Michael Le were working at Easy Wireless in San Diego. Appellant entered and told them he wanted to buy a cellular phone. Le gave appellant a credit form and asked him to fill it out. Appellant began filling out the form but stopped because he did not have a driver's license or any other identification. He tossed the application in the trash and said he would return later. Le attempted to escort appellant out the door. Appellant began to leave but then stopped, looked around, pulled out a silver gun and said: "I want the fucking money."

Ta went to the store safe and brought back a bag with approximately $5,500 in it and handed it to appellant. Appellant said he did not believe the money was real but eventually left the store. Police obtained appellant's fingerprints from the credit application found in the trash. After looking at a photographic line-up, Le said that he was 75 to 80 percent sure appellant was the robber.

On April 11, 2005, in accordance with a negotiated plea bargain, appellant pled guilty to robbery and using a pellet gun in the commission of that offense. (§§ 211, 12022, subd. (b)(1).) The change of plea form said, in part: "Sentence to be imposed is 1 year 4 months if this case is determined to be subordinate to SCS189831 to run consecutive to case SCS189831." Appellant stipulated to the preliminary hearing transcript as providing the factual basis for the guilty plea.

On May 26, 2005, the trial court determined that case No. SCS189831 was the subordinate case, nullifying the agreed upon prison sentence in the change of plea form.

Instead, the trial court sentenced appellant to serve five years, the upper-term sentence, for the robbery and an additional year for the gun enhancement. In total for both cases appellant was sentenced to seven years in state prison.

B. *Discussion*

Appellant argues he had a constitutional right to a jury trial with respect to the facts used to justify the trial court's imposition of the upper-term sentence for the robbery. He insists the upper-term sentence was based on facts which were not proved to a jury beyond a reasonable doubt and should therefore be reversed. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) We disagree.

The California Supreme Court has rejected the argument that the constitutional rule from *Blakely* applies to California's determinative sentencing scheme. (*People v. Black* (2005) 35 Cal.4th 1238.) In this case, the trial court imposed the upper-term sentence based on its findings that appellant's performance on probation or parole was unsatisfactory, his prior convictions were numerous or of increasing seriousness and that he had engaged in violent conduct. It was within the trial court's discretion to make such findings and award appellant with the upper-term sentence of five years for the robbery. (*Ibid.*)

Appellant acknowledges the current state of the law but raises the argument on appeal to exhaust his state remedies for federal review of this issue.[2]

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[2] This issue is currently pending in the United States Supreme Court in *Cunningham v. California* (Apr. 18, 2005) A103501, 2005 WL880983 [nonpub. opn., opn. mod. May 4, 2005], cert. granted Feb. 21, 2006, No. 05-6551, ___ U.S. ___ [126 S.Ct. 1329].

DISPOSITION

Both judgments are affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.